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The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

This issue of *The Survey* treats several recent decisions of significance in the area of New York practice. *Carrick v. Central General Hospital*, one of three Court of Appeals cases discussed, clarifies the applicability of the 6-month extension provided by CPLR 205(a) to a wrongful death action previously dismissed because letters of administration had not been obtained prior to commence-

* The following abbreviations will be used uniformly throughout *The Survey*:

New York Civil Practice Law and Rules (McKinney) CPLR
New York Civil Practice Act CPA
New York Criminal Procedure Law (McKinney) CPL
New York Code of Criminal Procedure CCP
Real Property Actions and Proceedings Law (McKinney) RPAPL
Domestic Relations Law (McKinney) DRL
Estates, Powers and Trusts Law (McKinney) EPTL
General Municipal Law (McKinney) GML
General Obligations Law (McKinney) GOL
D. Siegel, New York Practice (1978) SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1979) WK&M
The Biannual Survey of New York Practice *The Biannual Survey*
The Quarterly Survey of New York Practice *The Quarterly Survey*
The Survey of New York Practice *The Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b) FIRST REP.
1958 N.Y. Leg. Doc. No. 13 SECOND REP.
1959 N.Y. Leg. Doc. No. 17 THIRD REP.
1960 N.Y. Leg. Doc. No. 120 FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 SIXTH REP.

ment of the action. The *Carrick* Court held that in such case the plaintiff was entitled to reinstitute the action with the benefit of the extension of the statute of limitations. In a related case, *Jones v. State*, the Court held that the premature filing of a wrongful death claim in an action against the state constituted a jurisdictional defect requiring dismissal. Left open by the *Jones* Court is the availability of the CPLR 205(a) extension in an action in the Court of Claims.

Feldman v. New York City Health and Hospitals Corp., among the important lower court cases commented upon, examined a plaintiff's options for recovery of a judgment in an impleader situation where the main defendant is insolvent. The Supreme Court, Kings County, held that a defendant may satisfy a judgment against him with funds borrowed pursuant to an agreement arranged by the plaintiff, thus enabling the defendant to enforce a contribution claim against a solvent but otherwise unreachable third-party defendant. Also treated in *The Survey* is *Aversano v. Town of Brookhaven*, wherein the Appellate Division, Second Department, held that service of a summons without a complaint or CPLR 305(b) notice is a jurisdictional defect. Notably, the court further held that service of a notice of appearance and demand for a complaint by the defendant results in a waiver of this defect.

It is hoped that through presentation of these and other important decisions, *The Survey* will continue to keep the practitioner aware of recent developments in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 205(a): Six-month extension available where wrongful death action dismissed for want of a duly appointed administrator

When an action, timely commenced, is dismissed for reasons other than a voluntary discontinuance, a failure to prosecute, or a final judgment on the merits, CPLR 205(a) enables the plaintiff to commence a new action within 6 months of the dismissal.¹ Recent

¹ CPLR 205(a) provides:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or adminis-